Re Tan Peck Kee; ex parte LDE Project Sdn Bhd & Ors

HIGH COURT (PENANG) — BANKRUPTCY APPLICATION NO PA-29NCC-856–11 OF 2020
KENNETH ST JAMES JC
15 APRIL 2024

Bankruptcy — Setting aside — Application to set aside — Bankruptcy notice and creditor's petition — Whether judgment creditors were required to obtain leave of court before commencing bankruptcy action — Whether creditor's petition was premature as it was issued before act of bankruptcy — Insolvency Act 1967 ss 2 & 5(3)(b)

This was an appeal against the decision of the senior assistant registrar ('the SAR') in dismissing the application by the judgment debtor ('the JD') to set aside the bankruptcy notice ('the BN') and the creditor's petition ('the CP'). The BN issued against the JD was grounded on the summary judgment obtained by the judgment creditors ('the JCs') against the JD in a sessions court's suit ('SC Suit 11'). In the present appeal, the JCs admitted that they did not get the leave of court to commence the bankruptcy action as required under s 5(3)(b) of the Insolvency Act 1967 ('Act 360'), but the JCs argued that the subject contract in SC Suit 11 was an indemnity, not a guarantee, as such, they were not required to comply with the said provision ('the JCs' argument'). In addition to the above issue, the court had also considered whether the CP was premature as it was issued before the act of bankruptcy.

Held, allowing the appeal and setting aside the BN and CP with costs of RM10,000 (subject to allocator) for the proceeding before the SAR as well as the present appeal to be paid by the JCs to the JD:

(1) The court found that the JCs' argument was untenable because: (a) the subject contract was titled 'Guarantee And Indemnity'; and (b) cl 1 of the contract defined the sum of money that the JC and the two other named persons were obligated to pay on demand as the 'Guarantee Sum'. Thus, for all intents and purposes, the contract was a guarantee (see paras 12–13).

(2) Pursuant to s 5(3) of Act 360, leave of court was required for the JCs to commence the bankruptcy action against a 'social guarantor' as well as a 'guarantor other than a social guarantor'. Section 2 of Act 360 defined 'social guarantor' as a person who gives a guarantee to pay a sum due under any of the three types of loans listed. The subject 'Guarantee And Indemnity' in SC Suit 11 was not a guarantee that fell into any of the three types of loans listed, which made the JD a 'guarantor other than a

social guarantor' under s 5(3)(b) of Act 360, as such, leave was required for the JCs to commence the bankruptcy action against the JD. Since the JCs did not get the required leave, the BN and CP were rendered invalid. Thus, both the BN and CP were liable to be and should be set aside on this ground (see paras 7 & 15–18).

(3) The JCs could only present the CP against the JD after the JD had committed an act of bankruptcy. The act of bankruptcy relied on in this bankruptcy action was the JD's act of not paying i.e. omission to pay the judgment sum demanded in the BN, within seven days from the date of service of the BN. In this case, the JCs obtained an order to serve the BN on the JD by substituted service ('the order'). The court found that the JCs had miscomputed the date that the JD was said to have committed the act of bankruptcy. The order required that the BN was only deemed served on the JD by substituted service after the lapse of seven days from the date of the last date of substituted service by the newspaper advertisement of the BN. The BN was not deemed served on the very day that the BN was advertised in the newspaper (see paras 23, 25 & 27).

(4) Thus, since the date of the advertisement of the BN was on 17 May 2021, the BN was deemed served on the JD by substituted service on 24 May 2021 (seven days from 17 May 2021). The JD then had seven days to pay the BN sum. The deadline to pay the BN sum was therefore on 31 May 2021. The JD did not pay the BN sum by 31 May 2021. He then committed the act of bankruptcy on the next day: 1 June 2021. The JCs filed the CP against the JD on 28 May 2021, before the act of bankruptcy, rendering the CP indeed premature and invalid. The CP should be set aside on this ground as well (see para 29).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan penolong kanan pendaftar ('SAR') yang menolak permohonan penghutang penghakiman ('JD') untuk mengenepikan notis kebankrapan ('BN') dan petisyen pemiutang ('CP'). Notis kebankrapan yang dikeluarkan terhadap JD adalah berdasarkan penghakiman terus yang diperoleh oleh pemiutang-pemiutang penghakiman ('JCs') terhadap JD dalam suatu saman di mahkamah sesyen ('Saman MS 11'). Dalam rayuan ini, JC mengakui bahawa mereka tidak mendapat kebenaran mahkamah untuk memulakan tindakan kebankrapan seperti yang dikehendaki di bawah s 5(3)(b) Akta Insolvensi 1967 ('Akta 360'), tetapi JC berhujah bahawa kontrak subjek dalam Saman MS 11 adalah indemniti, bukan jaminan, oleh itu, mereka tidak perlu mematuhi peruntukan tersebut ('hujah JCs'). Di samping isu di atas, mahkamah juga telah mempertimbangkan sama ada CP tersebut adalah pramatang kerana ia dikeluarkan sebelum perbuatan kebankrapan.

Diputuskan, membenarkan rayuan dan mengenepikan BN dan CP dengan kos RM10,000 (tertakluk kepada alokator), untuk prosiding di hadapan SAR

serta rayuan semasa, yang perlu dibayar oleh JCs kepada JD:

(1) Mahkamah mendapati hujah JCs tidak boleh dipertahankan kerana: (a) kontrak subjek bertajuk 'Guarantee And Indemnity'; dan (b) klausa 1 kontrak tersebut mentakrifkan jumlah wang yang JC dan dua orang lain yang dinamakan wajib bayar apabila diminta sebagai 'Guarantee Sum'. Oleh itu, bagi semua maksud dan tujuan, kontrak tersebut adalah jaminan (lihat perenggan 12–13).

(2) Menurut s 5(3) Akta 360, kebenaran mahkamah diperlukan bagi JCs untuk memulakan tindakan kebankrapan terhadap 'penjamin sosial' serta 'penjamin selain daripada penjamin sosial'. Seksyen 2 Akta 360 mentakrifkan 'penjamin sosial' sebagai orang yang memberi jaminan untuk membayar jumlah yang perlu dibayar di bawah mana-mana tiga jenis pinjaman yang disenaraikan. Subjek 'Guarantee And Indemnity' dalam Saman MS 11 bukanlah jaminan yang termasuk dalam mana-mana tiga jenis pinjaman yang disenaraikan, yang menjadikan JD sebagai 'penjamin selain daripada penjamin sosial' di bawah s 5(3)(b) Akta 360, oleh itu, kebenaran diperlukan bagi JCs untuk memulakan tindakan kebankrapan terhadap JD. Oleh kerana JCs tidak mendapat kebenaran yang diperlukan, BN dan CP tersebut telah menjadi tidak sah. Oleh itu, kedua-dua BN dan CP tersebut perlu dan harus diketepikan atas alasan ini (lihat perenggan 7 & 15–18).

(3) Pemiutang-pemiutang penghakiman hanya boleh mengemukakan CP terhadap JD selepas JD telah melakukan perbuatan kebankrapan. Perbuatan kebankrapan yang menjadi sandaran dalam tindakan ini adalah perbuatan JD tidak membayar iaitu peninggalan untuk membayar jumlah penghakiman yang dituntut dalam BN, dalam tempoh tujuh hari dari tarikh penyampaian BN. Dalam kes ini, JCs telah mendapatkan perintah untuk menyampaikan BN kepada JD melalui penyampaian ganti ('perintah tersebut;). Mahkamah mendapati JCs telah tersalah kira tarikh JD dikatakan melakukan perbuatan kebankrapan. Perintah tersebut menghendaki BN hanya disifatkan disampaikan kepada JD melalui penyampaian ganti selepas tamat tujuh hari dari tarikh terakhir penyampaian ganti melalui iklan BN tersebut di akhbar. Notis kebankrapan tersebut tidak dianggap disampaikan pada hari BN tersebut diiklankan dalam akhbar (lihat perenggan 23, 25 & 27).

(4) Oleh itu, memandangkan tarikh pengiklanan BN adalah pada 17 Mei 2021, BN disifatkan disampaikan kepada JD secara penyampaian ganti pada 24 Mei 2021 (tujuh hari daripada 17 Mei 2021). Penghutang penghakiman kemudiannya mempunyai tujuh hari untuk membayar jumlah BN tersebut. Oleh itu, tarikh akhir untuk membayar jumlah BN tersebut adalah pada 31 Mei 2021. Penghutang penghakiman tidak membayar jumlah BN tersebut sebelum 31 Mei 2021. Dia kemudiannya melakukan perbuatan kebankrapan pada hari berikutnya: 1 Jun 2021.

Pemiutang-pemiutang penghakiman memfailkan CP terhadap JD pada 28 Mei 2021, sebelum perbuatan kebankrapan, menjadikan CP tersebut sememangnya pramatang dan tidak sah. Petisyen pemiutang tersebut hendaklah diketepikan atas alasan ini juga (lihat perenggan 29).]

Cases referred to

Sovereign General Insurance Sdn Bhd v Koh Tian Bee [1988] 1 MLJ 304; [1988] 1 CLJ 155; [1987] 1 MLRA 326, SC (refd)

Legislation referred to

Insolvency Act 1967 ss 2 3(1)(i) 5(1)(c) 5(3)(b)

Sunny Khoo (Sunny Khoo & Company) for the judgement creditors.
Arthur Wang (with Nattawynn Su Wit) (Arthur Wang, Lian & Assoc) for the judgement debtor.

Kenneth St James JC:

PRELUSION

[1] By an order dated 9 November 2021, the senior assistant registrar ('SAR') dismissed encl 28 — the judgment debtor's application to set aside the bankruptcy notice ('BN') and the creditor's petition ('CP').

[2] The judgment debtor ('JD') appeals to the judge in chambers. The notice of appeal to judge in chambers is the appeal for determination before me.

[3] In hearing and determining this appeal, I am effectively deciding the merits of encl 28 — the JD's application to set aside the BN and the CP.

[4] The JD raises several grounds in this appeal. However, it suffices to discuss and determine only the issues that are necessary to determine this appeal. These are the JD's strongest grounds — the grounds that mattered.

[5] I allow the JD's appeal ie I reverse the SAR's decision. In other words, I grant the JD's application to set aside the BN and the CP. My reasons are as follows.

A THE JCs NEEDED LEAVE TO COMMENCE THIS BANKRUPTCY ACTION AGAINST A GUARANTOR

[6] There are four judgment creditors ('JCs') in this bankruptcy action.

B **[7]** Section 5(3)(b) of the Insolvency Act 1967 ('Insolvency Act') requires the JCs to obtain the leave of court before they can commence this bankruptcy action against the JD.

C **[8]** Section 5(3)(b) provides as follows:

Section 5 Conditions on which creditor may petition

(3) A petitioning creditor shall not be entitled to commence any bankruptcy action —

D (a) against a social guarantor; and

(b) against a guarantor other than a social guarantor *unless the petitioning creditor has obtained leave from the court*. (Emphasis added.)

E **[9]** In this bankruptcy action, the BN issued against the JD was grounded on the summary judgment dated 17 October 2019 which the JCs (as plaintiffs) obtained against the JD (as defendant) in sessions court Suit No PA-B52–11–06 of 2019 ('SC Suit 11').

F **[10]** In this appeal, the JCs admit that they did not get the leave of court before they requested for the BN to be issued against the JD. They, however, argue that the JD is not a guarantor. They assert that the JD is not a guarantor because the subject contract in SC Suit 11 which resulted in the judgment, was not a guarantee.

G **[11]** First, the JCs argue that the subject contract in SC Suit 11 was an indemnity, not a guarantee. Hence the JCs need not comply with s 5(3)(b) of the Insolvency Act.

H **[12]** I find this argument untenable because the subject contract is titled 'Guarantee And Indemnity'. The preamble of this contract states that the JD and two other named persons 'hereby unconditionally jointly and severally agree with and guarantee you (the JCs) ...'.

I **[13]** Additionally, cl 1 of the contract defines the sum of money that the JC and the two other named persons are obligated to pay on demand as the 'guarantee sum'. Thus, for all intents and purposes, the contract was a guarantee.

[14] The JCs want to go into an in-depth analysis of whether the contract is in fact and in law a guarantee, or in effect just an indemnity — to determine whether the JD is a guarantor under the Insolvency Act. I am of the view that there is no necessity to analyse the issue in this manner.

[15] The leave of court is required for the JCs to commence this bankruptcy action against a 'social guarantor' as well as a 'guarantor other than a social guarantor'. The Insolvency Act itself guides us with a definition of a 'social guarantor' under s 2. Section 2 defines a 'social guarantor' in this manner:

> 'social guarantor' means a person who provides, not for the purpose of making profit, the following guarantees:
>
> (a) a guarantee for a loan, scholarship or grant for educational or research purposes;
>
> (b) a guarantee for a hire-purchase transaction of a vehicle for personal or non-business use; and
>
> (c) a guarantee for a housing loan transaction solely for personal dwelling.

[16] A 'social guarantor' is a person who gives a guarantee to pay a sum due under any of the three types of loans listed. This definition necessarily means that a person who gives a guarantee that is not for the three types of loans listed concerning a 'social guarantor', is a 'guarantor other than a social guarantor'.

[17] The subject guarantee and indemnity in SC Suit 11 is not a guarantee that falls into any of the three types of loans listed, which makes the JD a 'guarantor other than a social guarantor' under s 5(3)(b) of the Insolvency Act. As the JD is a 'guarantor other than a social guarantor' — leave is required for the JCs to commence this bankruptcy action against the JD.

[18] Since the JCs did not get the leave of court before they commenced this bankruptcy action against the JD, the BN is rendered invalid. It follows that the CP is also rendered invalid. Both the BN and the CP are liable to be and should be set aside on this ground.

THE CP WAS PREMATURE — IT WAS ISSUED BEFORE THE ACT OF BANKRUPTCY

[19] One of the conditions for the JCs to file a CP against the JD is that the JD has committed an act of bankruptcy. And, the CP must be filed within six months after the JD committed the act of bankruptcy.

[20] Section 5(1)(c) of the Insolvency Act is set out below for reference:

> *Section 5 Conditions on which creditor may petition*

A (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless —

(c) *the act of bankruptcy* on which the petition is grounded *has occurred* within six months *before* the presentation of the petition; ... (Empahsis added.)

B **[21]** There are several acts (or omissions) which are deemed to be acts of bankruptcy. The pertinent act relied on by the JCs in this bankruptcy action was the JD's default in paying the BN sum stated in the BN within seven days from the date the BN was served on the JD.

C **[22]** Section 3(1)(i) of the Insolvency Act is the relevant provision. Section 3(1)(i) provides:

Section 3 Acts of bankruptcy

D (1) A debtor commits an act of bankruptcy in each of the following cases:

(i) *if a creditor has obtained a final judgment* or final order against him for any amount *and* execution thereon not having been stayed *has served on him in Malaysia*, or by leave of the court elsewhere, *a bankruptcy notice* under this Act *requiring him to pay the judgment debt* or sum ordered to be paid *in accordance* E *with the terms of the judgment* or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and *he does not within seven days after service of the notice* in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to F effect the service, either *comply with the requirements of the notice* or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained: ... (Emphasis added.)

G **[23]** In summary, the JCs can only present the CP against the JD after the JD has committed an act of bankruptcy. The act of bankruptcy relied on in this bankruptcy action was the JD's act of not paying ie omission to pay the judgment sum demanded in the BN, within seven days from the date the BN H was served on the JD (see *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304; [1988] 1 CLJ 155; [1987] 1 MLRA 326 (SC)).

[24] In *Sovereign General Insurance*, the Supreme Court propounded (at MLJ p 305):

I ... Under s 3(1)(i) of the Bankruptcy Act 1967, a debtor commits an act of bankruptcy if a creditor has obtained a final judgment for any amount and has served on him a bankruptcy notice requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment. He has seven days after service of the notice to comply with the requirements of the notice or satisfy

the court that he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained.

...

[25] In this bankruptcy action, the JCs obtained an order to serve the BN on the JD by substituted service. The terms of the order for substituted service state that the BN is deemed properly, sufficiently and regularly served on the JD seven days after the last act of posting or advertising the BN.

[26] The JCs do not dispute that their last date of effecting substituted service, which was by advertising the BN in a daily newspaper, was 17 May 2021. The JCs assert that the BN was deemed served on that very day ie on 17 May 2021. And as the JD did not pay the BN sum within seven days from 17 May 2021, the JD committed an act of bankruptcy on 24 May 2021 (17 May 2021 plus seven days). The JCs filed the CP against the JD on 28 May 2021, which was after the JD's act of bankruptcy.

[27] I find that the JCs have miscomputed the date that the JD was said to have committed the act of bankruptcy. The JCs have disregarded the seven day deeming period provided for by the order for substituted service. The order for substituted service required the JCs to 'wait' for seven days after the last date of substituted service before the JCs could assert that an act of bankruptcy was committed. In other words, the order for substituted service allowed the JD to be given seven days before the BN was deemed served on the JD. Put yet another way, the order for substituted service required that the BN was only deemed served on the JD by substituted service after the lapse of seven days from the date of the last date of substituted service by the newspaper advertisement of the BN. The BN was not deemed served on the very day that the BN was advertised in the newspaper.

[28] This meant that since the date of the advertisement of the BN was on 17 May 2021, the BN was deemed served on the JD by substituted service on 24 May 2021 (seven days from 17 May 2021). The JD then, according to the terms of the BN, had seven days from 24 May 2021 to pay the BN sum. The deadline to pay the BN sum was therefore on 31 May 2021 (seven days after 24 May 2021). The JD did not pay the BN sum by 31 May 2021. He then committed the act of bankruptcy on the next day: 1 June 2021.

[29] The JCs filed the CP against the JD on 28 May 2021, before the act of bankruptcy, rendering the CP indeed premature and invalid. The CP should be set aside on this ground as well.

[30] I therefore find that the CP is also bad in law and is rendered invalid.

CONCLUSION

[31] The BN is bad in law because the JCs did not obtain the leave of court to institute this bankruptcy action against the JD.

[32] The CP is bad in law because it was presented against the JD before the JD committed the asserted act of bankruptcy on which the CP is premised.

[33] These two cogent grounds are sufficient to compel me to allow the JD's appeal.

[34] In the circumstances, I allow the JD's appeal against the SAR's decision on encl 28 — the JD's application to set aside the BN and the CP. I therefore order that the BN be set aside and the CP be set aside as well, with costs of RM10,000 for the proceeding before the SAR and for this appeal, to be paid by the JCs to the JD by 24 February 2024. Costs are subject to the allocator.

Appeal allowed; BN and CP set aside with costs of RM10,000 (subject to allocator) for proceeding before the SAR as well as the present appeal to be paid by JCs to JD.

Reported by Dzulqarnain Ab Fatar